Supreme Court, U.S.
FILED
DEC 20 2010
OFFICE OF THE CLERK

No. 09-1158

In the Supreme Court of the United States

DAVID MAXWELL-JOLLY, Director of the Department of Health Care Services, State of California, et al.,

Petitioners,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
DOUGLAS M. PRESS
Senior Assistant Attorney General
RICHARD T. WALDOW
KARIN S. SCHWARTZ*
**Counsel of Record*
SUSAN M. CARSON
JENNIFER KIM
Supervising Deputy Attorneys General
GREGORY BROWN
GREGORY M. CRIBBS
Deputy Attorneys General

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Telephone: (415) 703-1382
Fax: (415) 703-5480
Email: Karin.Schwartz@doj.ca.gov

Counsel for Petitioners

Of counsel:
DAN SCHWEITZER
2030 M Street, NW, 8th Floor
Washington, DC 20036
(202) 326-6010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

TABLE OF CONTENTS

Page

Supplemental reasons for granting the petition..... 1

Conclusion..... 4

Appendix

Letter from Debbie Chang, Director, Division of Benefits, Coverage and Payment, FCHPG, Health Care Financing Administration, Department of Health & Human Services, to John S. Pierson, Deputy Director and Chief Counsel, California Department of Health Services (Jan. 28, 1999).....App. 1

TABLE OF AUTHORITIES

Page

CASES

Evergreen Presbyterian Ministries Inc. v. Hood, 235 F.3d 908 (5th Cir. 2000) 1

Exeter Memorial Hospital Association v. Belshe, 145 F.3d 1106 (9th Cir. 1998) 2

Oregon Association of Homes for the Aging v. Oregon, 5 F.3d 1239 (9th Cir. 1993) 2

Wilder v. Va. Hosp. Association, 496 U.S. 498 (1990) 1

Wisconsin Hospital Association v. Reivitz, 733 F.2d 1226 (7th Cir. 1984) 2

Statutes

42 U.S.C. § 1396a(a)(13)(A) 1

42 U.S.C. § 1396a(a)(30)(A) 1

OTHER AUTHORITIES

42 C.F.R. § 447.253 ..... 1, 2

42 C.F.R. § 447.253(i) 1

42 C.F.R. § 447.256(c) 3

H.R. Rep. No. 105-149 (1997) 1

Petitioners submit this supplemental brief in response to the Joint Supplemental Brief of Respondents California Pharmacists Association, et al., Independent Living Center of Southern California, et al., and Lydia Dominguez, et al.

SUPPLEMENTAL REASONS FOR GRANTING THE PETITION

Respondents cite a regulation, 42 C.F.R. § 447.253(i), for the proposition that federal approval is required before a state may implement a Medicaid rate reduction. However, § 447.253 does not contain an express pre-approval requirement; it was promulgated to implement the Boren Amendment (former 42 U.S.C. § 1396a(a)(13)(A)), which has since been repealed, not 42 U.S.C. § 1396a(a)(30)(A); and the United States Department of Health and Human Services (HHS) has confirmed that states are not required to comply with the Boren-era requirements implemented by this regulation. Supp. App. 1. Unlike § 1396a(a)(30)(A), Boren expressly required states to "find[], and make[] assurances satisfactory to the Secretary" that their rates were "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502-03 (1990). In repealing Boren, Congress sought to increase states' flexibility in managing their Medicaid programs and in implementing cost savings. H.R. Rep. No. 105-149, at 590-91 (1997); *Evergreen Presbyterian*

Ministries Inc. v. Hood, 235 F.3d 908, 919 n.12 (5th Cir. 2000).[1]

The Third and Ninth Circuit cases cited by respondents are similarly inapposite. They, too, solely concerned states' obligations under the Boren Amendment. Respondents cite *Oregon Association of Homes for the Aging v. Oregon*, 5 F.3d 1239 (9th Cir. 1993), but not the Ninth Circuit's later decision, *Exeter Memorial Hospital Association v. Belshe*, 145 F.3d 1106, 1109 (9th Cir. 1998), which recognized that the outcome could be different following repeal of Boren. Even as to the Boren Amendment, with its more rigorous federal approval requirements, the circuits were not unanimous in their interpretations. *See Wis. Hosp. Ass'n v. Reivitz*, 733 F.2d 1226, 1237 (7th Cir. 1984) ("[T]he omission of this requirement [from the statute], when considered in connection with Congress' previously noted statements that it intended to give the states greater flexibility and freedom from extensive federal oversight, suggests that *proposed amendments may be implemented before approval is received from HHS*." (emphasis added)).

Respondents already made this argument regarding the need for HHS pre-approval in opposing

---

[1] Even were it in effect and relevant, § 447.253 would not apply to the state statute at issue in the *Dominguez* decision, which does not effectuate a rate reduction, but only a reduction in the State's contribution to rates set by the counties pursuant to collective bargaining with provider unions. *See* Pet. App. 59, 65-66.

the petition for certiorari,[2] and the Solicitor General declined to address or endorse it in his invitation brief. The sudden, recent decision of the Centers for Medicare and Medicaid Services to disapprove all of the long-pending State Plan Amendments (SPAs) at issue here and in the two other petitions for certiorari, largely for reasons having nothing to do with their merits, does not change the analysis, as there has been no final agency action concerning any of the SPAs at issue. Once the pending administrative appeals are concluded, some or all of the SPAs undoubtedly will be approved, and that approval may be retroactive to the quarter in which the SPAs were filed. 42 C.F.R. § 447.256(c). That should conclude the matter, but it will not, because California has been compelled by court injunctions during the interim period to pay rates in excess of the rates for which it is seeking federal approval.

The Ninth Circuit rulings in these cases have had, and continue to have, a devastating effect on California's fisc – and are based on an interpretation of the Medicaid Act that the United States agrees is erroneous. The Court should grant the petition.

---

[2] Brief of Respondents California Pharmacists Association, et al., in Opposition at 2, *Maxwell-Jolly v. California Pharmacists Association, et al.*, No. 09-1158 (S. Ct. May 27, 2010); *see also* Brief of Respondents Sacramento Family Medical Clinics, Inc., et al., in Opposition at 2, *Maxwell-Jolly v. Independent Living Center of S. Cal.*, No. 09-958 (S. Ct. Apr. 19, 2010).

[LOGO] DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

JAN 28 1999 Center for Medicaid and State Operations
7500 Security Boulevard
Baltimore, MD 21244-1850

John S. Pierson
Deputy Director and Chief Counsel
California Department of Health Services
714 P Street
Sacramento, CA 94234-7320

Dear Mr. Pierson:

You have requested additional confirmation of the Boren Repeal guidance issued in the Health Care Financing Administration (HCFA's) December 10, 1997 letter to State Medicaid Directors. Specifically, you are seeking confirmation that States are no longer required to a) make findings and provide assurances that their payment rates are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated institutional providers and b) submit information related to these assurances.

HCFA's policy with respect to the need for findings, assurances and related information is unchanged from that reflected in the December 10, 1997 letter. Effective October 1, 1997, section 4711 of the Balanced Budget Act of 1997 repealed the Boren amendment requirements previously contained in sections 1902(a)(13) of the Social Security Act. Once repealed, the statutory basis for those requirements derived

from the Boren Amendment were superseded by the new public process requirements set out in section 4711. Included among those now superseded requirements are those reflected in Federal regulations at 42 CFR §§ 447.253 and 447.255. Therefore, HCFA advised States that they were no longer required to comply with the findings and assurances requirements, or those governing related information, contained in these provisions for plan amendments effective on or after October 1, 1997.

A Notice of Proposed Rulemaking amending the Medicaid regulations that deal with payment for the services of hospitals and long-term care facilities that would conform them to section 4711 of the Balanced Budget Act of 1997, is currently in the clearance process within the Department of Health and Human Services. We expect this publication to reflect the guidance we have been giving States and others since the enactment of section 4711. We are hopeful this proposed rule will be published soon.

I hope this letter is of assistance in conveying HCFA's position with respect to the elimination of Boren-related requirements.

Sincerely,

/s/ Debbie I. Chang

Debbie Chang
Director
Division of Benefits, Coverage
and Payment, FCHPG

cc:

HCFA Associate Regional Administrator
for Medicaid and State Operations
San Francisco, California